BOON CHANG (M) ENGINEERING & CONSTRUCTION SDN BHD *a*

v.

TEJANA TRADING CORPORATION SDN BHD & ORS

HIGH COURT MALAYA, JOHOR BAHRU *b*
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-49-99]
6 SEPTEMBER 1999

CIVIL PROCEDURE: *Stay of proceedings - Stay of proceedings pending arbitration - Application for - Defendants did not sign contract that contained arbitration clause - Whether dispute should be referred to arbitration in view thereof - Issue of fraud raised - Whether arbitration appropriate - Arbitration Act 1952, s. 25(2) - Whether allegation of fraud a ground for refusing stay - Statement of defence filed - Whether defendants should be estopped from making an application for stay - Whether grant of stay would result in a multiplicity of proceedings - Plaintiff's claim for an order for lifting the corporate veil - Whether said matter should be adjudicated in the High Court* *c* *d*

CIVIL PROCEDURE: *Execution - Stay - Application for - Whether there were special circumstances - Whether appeal would be rendered nugatory* *e*

The plaintiff was invited by the 2nd defendant to enter into negotiations with a view to being appointed a sub-contractor of the 3rd defendant in relation to a project undertaken by the Government of Malaysia. At the request of both the 2nd and the 3rd defendants, the plaintiff commenced works in relation to the said project, notwithstanding the fact that a formal contract had not been drawn nor executed between the three parties. Thereafter the 2nd defendant forwarded a contract for the plaintiff to execute with the 1st defendant on behalf of the 2nd and 3rd defendants. The plaintiff returned the said contract to the 2nd defendant for the 1st defendant's execution but to-date the plaintiff did not receive a copy of the said contract duly executed by the 1st defendant. The plaintiff brought an action against the defendants claiming that the defendants had failed and neglected to pay the plaintiff the full value for the works done. The plaintiff also claimed, *inter alia*, for an order that the veil of incorporation of the defendants be lifted as the plaintiff was of the view that the 1st defendant was the alter ego of the 2nd and 3rd defendants. *f* *g* *h*

In this instance, the defendants applied to stay the proceedings and to refer the dispute to arbitration under the arbitration clause in the said contract. The 1st defendant also appealed against the decision of the Senior Assistant Registrar ('SAR') who gave summary judgment in favour of the plaintiff against the 1st defendant for the sum of RM7,675,328.76. Also, an application for stay of the execution of the order of the SAR was made. *i*

Held:

[1] Having taken the necessary steps to defend the action, the 2nd and 3rd defendants must be estopped from invoking their rights to stay these proceedings.

[2] Where a contract had been signed by one party only, it could be enforced where there was evidence such as part performance by one party and acceptance by the other that the other party had elected to be bound by it.

[3] Since the 1st defendant did not sign the contract the dispute between the plaintiff and the 1st defendant could never be referred to arbitration.

[4] The defendants' contention that the plaintiff's statement of claim disclosed the issue of fraud constituted a compelling ground that the disputes between the parties ought not to be arbitrated but rather litigated in a court of law. Section 25(2) of the Arbitration Act 1952 is a specific provision and it gives the power to the High Court to order that an arbitration agreement shall cease to have effect and direct that the issue be tried by the High Court if fraud is raised. The existence of an allegation of fraud, however, is sufficient and a good ground for refusing a stay.

[5] The 2nd defendant had unequivocally undertaken to file their statement of defence by requesting for an extension of time for that purpose. The plaintiff was led to believe that the 2nd defendant intended to file their statement of defence and at the same time to proceed to defend the suit. By their own conduct, the 2nd defendant must be estopped from making an application to the contrary.

[6] The unwillingness of the 2nd defendant to go to court meant that they valued the privacy of an arbitration. If that was the reason, then there was every reason for these proceedings to proceed to open court trial and not be shrouded in total secrecy.

[7] If the stay was granted in favour of the 1st defendant, there would be two sets of proceedings. One by the plaintiff against the 1st defendant by way of an arbitration. The other would be by the plaintiff against the 3rd defendant arising out of the same facts in a court of law. The plaintiff would then have to revert to this court to prosecute their claim against the 2nd and the 3rd defendants in order to lift the corporate veil. There would thus be a multiplicity of proceedings. A multiplicity of suits resulting in conflicting decisions could be avoided by proceeding with this suit in this court as there were common questions of fact among the parties that were inextricably linked to one another.

[8] The issues of lifting the corporate veil involved complex legal technicalities and only the High Court as opposed to a single arbitrator would be able to effectively adjudicate on the matter. The plaintiff had successfully demonstrated that the disputes between the parties should not be arbitrated.

[9] The SAR was justified in his conclusion that the 1st defendant had admitted owing the plaintiff the sum of RM7,675,328.76. There was clear admission by the 1st defendant of the debt amounting to RM7,675,328.76 that was due to the plaintiffs.

[10] In law there was no necessity and no requirement on the part of the judgment creditor to prove its solvency to his judgment debtor. Neither the solvency of the plaintiff as the judgment creditors nor the difficulty of recovering the monies constitute special circumstances in law to justify the grant of a stay of execution of the order of the SAR who gave summary judgment in favour of the plaintiff.

[10a] This was a money judgment which could easily be reimbursed by the plaintiff and so the nugatory approach when applied would not aid the 1st defendant at all. No stay of execution would be granted to the 1st defendant as the plaintiff must be entitled to enjoy the fruits of their litigation.

[11] In filing an application for an injunction in the Shah Alam High Court to prevent the plaintiff from presenting a winding-up petition, the 1st defendant had clearly abused the process of the court and this court could not tolerate the conduct of the 1st defendant at all.

[Applications dismissed with costs.]

Case(s) referred to:

Alfred Dunhill Ltd v. Sunaptic SA [1979] FSR 337 ***(refd)***

Aspatra Sdn Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor [1988] 1 MLJ 97 ***(refd)***

Atkins v. The Great Western Railway Company 11 TLR 400 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail & Ors [1992] 1 CLJ 627 ***(refd)***

Birmingham and District Land Company v. London and North Western Railway Company [1889] 40 Ch D 268 ***(refd)***

Chappel v. North [1891] 2 QB 252 ***(refd)***

Combe v. Combe [1951] 1 All ER 767 ***(refd)***

Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim [1999] 5 CLJ 582 ***(refd)***

Director General of Inland Revenue v. Ee Sim Sai [1977] 2 MLJ 32 ***(refd)***

Griffiths v. Benn 27 TLR 350 ***(refd)***

H Rubber Estates Bhd v. Director-General of Inland Revenue [1979] 1 MLJ 115 ***(refd)***

Halifax Overseas Freighters, Ltd v. Rasno Export; Techno Prominport; And Polskie Linie Oceaniczne PPW (The 'Pine Hill') [1958] Lloyd's List Law Reports, vol 2, 146 ***(refd)***

Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd [1995] 3 CLJ 9 ***(refd)***

Hira Devi v. Official Assignee, Bombay AIR [1958] SC 448 ***(refd)***

Hughes v. Metropolitan Railway Co [1877] 2 App Cas 439 ***(refd)***

Ives & Barker v. Willans [1894] 2 Ch 478 ***(refd)***

Jacobs v. Booth Distillery Co [1901] 85 LT 262 ***(refd)***

Karpal Singh v. Atip Ali [1986] 2 CLJ 419 ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1983] 2 CLJ 187 ***(refd)***

Koh Siak Poo v. Perkayuan OKS Sdn Bhd & Ors [1989] 1 CLJ 30 ***(refd)***

Kong Wah Housing Development Sdn Bhd v. Desplan Construction Trading Sdn Bhd [1991] 2 CLJ 1177 ***(refd)***

Lai Siew Wah Sdn Bhd v. Ng Chin [1988] 1 CLJ 603 ***(refd)***

Lane v. Herman [1939] 3 All ER 353 ***(refd)***

Lee Wah Bank Ltd v. Ng Kim Lek & Ors [1979] 1 MLJ 21 ***(refd)***

Legione v. Hateley [1983] 57 ALJR 292 ***(refd)***

Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd [1970] 2 MLJ 111 ***(refd)***

Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 1 CLJ 426 ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed [1998] 2 CLJ 340 ***(refd)***

Malaysia Government Officers' Co-operative Housing Society Ltd v. United Asia Investment Ltd & Ors [1972] 1 MLJ 113 ***(refd)***

Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors [1985] 1 CLJ 181 ***(refd)***

Mitra & Co v. Thevar & Anor [1960] MLJ 79 ***(refd)***

Monk v. Bartram [1891] 1 QB 346 ***(refd)***

Monro v. Bognor UDC [1915] 3 KB 167 ***(refd)***

Myers v. Elman [1940] AC 282 ***(refd)***

Navarino Salvors, Ltd v. Navarino Recovery, Ltd [1925] Lloyd's List Law Report, vol 23, p 36 ***(refd)***

Pedac Holdings (S) Pte Ltd v. First Noodle Shop Pte Ltd [1990] 2 MLJ 404 ***(refd)***

Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd [1991] 3 CLJ 2400 ***(refd)***

Poh Sin Mining Co. v. Welfare Insurance Co Ltd [1971] 1 MLJ 65 ***(refd)***

Ponniah v. Chinniah [1961] MLJ 66 ***(refd)***

Prestwick v. Poley 18 CBNS 806 ***(refd)***

Radford v. Hair & Ors [1971] 2 All ER 1089 ***(refd)***

Re Application by Dow Jones (Asia) Inc [1988] 1 MLJ 222 ***(refd)***

Re Howard E Cashin [1989] 3 MLJ 129 ***(refd)***

Russel v. Russel [1880] 14 Ch D 471 ***(refd)***

Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd [1985] 2 CLJ 97 ***(refd)***

Smith, Hogg & Co Ltd v. The Black Sea & Baltic General Insurance Co Ltd 162 LT 11 ***(refd)***

Suncast Sdn Bhd (No: Syarikat 296921-W) v. Padang Indah Sdn Bhd (No: Syarikat 206187-A) (unreported) ***(refd)***

Sutters v. Briggs [1922] 1 AC 1 ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
Syn Lee & Co Ltd v. Bank of China [1961] MLJ 87 ***(refd)***
Tac Construction & Trading v. Bennes Engineering Berhad (No 2) [1999] 2 CLJ 518 ***(refd)***
Tan Chong & Sons Motor Co (Sdn) Bhd v. Alan McKnight [1983] 1 CLJ 77 ***(refd)***
Taunton Collins v. Cromie And Another [1964] 2 All ER 332 ***(refd)***
The "Asean Promoter" [1982] MLJ 108 ***(refd)***
The Elizabeth H [1962] 1 Lloyd's Rep 172 ***(refd)***
Thomas v. Attorney General of Sarawak [1961] 1 MLJ 111 ***(refd)***
Trade Facilities Pte Ltd & Ors v. Public Prosecutor [1995] 2 SLR 475 ***(refd)***
Turnock v. Sartoris [1889] Ch D vol XL 111 ***(refd)***
United Malayan Banking Corp Bhd v. Tan Lian Keng and Ors [1990] 1 MLJ 280 ***(refd)***
Wallis v. Hirsch [1856] 1 CBNS 316 ***(refd)***
Wickman Tools v. Schuler AG [1974] AC 235 ***(refd)***
Yee Chang & Co Ltd v. NV Koninklijke Paketvaart Maatschappij [1958] MLJ 131 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 25(2)
Civil Law Act 1956, s. 11
Companies Act 1965, s. 218
Evidence Act 1950, ss. 91-99, 144
Rules of the High Court 1980, O. 14

Other source(s) referred to:
Company Law, *Butterworths*, *London*, 1985, p 57
Evidence, Phipson, 9th edn, p 602
Halsbury's Laws of England, 3rd edn, vol 16, p 35
Interpretation of Statutes, Maxwell, 12th edn, p 28
The Concise Oxford Dictionary of Current English, HW Fowler and FG Fowler, 9th edn

For the plaintiff - M Pathmanathan; M/s Yusof Khan & Pathmanathan
For the 1st defendant - S Sagadeva; M/s Saga, Raja & Kumar

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Encls 19, 22 And 14

In encl. 19, the first defendant (Tejana Trading Corporation Sdn Bhd) applied to stay these proceedings pending reference to arbitration and it was supported by an affidavit of the first defendant's solicitor by the name of Mr. S Sagadeva that was affirmed on 19 April 1999 as seen in encl. 18. The second defendant

(Mitsui & Co. Sdn Bhd), not wanting to be left out, filed an application in encl. 22 to strike out and dismiss the plaintiffs' action filed against the second defendant or alternatively to stay the action pending reference to arbitration of the plaintiffs' claim against the first defendant and it was supported by an affidavit affirmed by the second defendant's solicitor by the name of Miss Wong Chee Lin on 23 April 1999 as seen in encl. 21. Acting in unison, the third defendant (Tomoe Corporation) also filed an application in encl. 14 to stay these proceedings pending reference to arbitration of (a) the plaintiffs' claim against the first defendant and (b) the disputes between the first defendant and the third defendant. Enclosure 14 was supported by an affidavit of Mr. Ng Chew Hor, learned counsel for the third defendant, that was affirmed on 19 April 1999 as seen in encl. 13.

It would not be out of place to mention that all the three defendants in these proceedings have entered unconditional appearances to the plaintiffs' claim prior to the filing of the respective applications in encls. 19, 22 and 14. The affidavits in support of the applications by all the three defendants were affirmed by their respective solicitors and not the defendants' directors or principal officers. Every application in chambers must be supported by an affidavit. As a sworn statement, the affidavit can be used as evidence of the matters deposed. But draftsmen of affidavits should always be wary – for they should not out into the mouths of the intended deponent legal arguments which the deponent would not have imagined (*Alfred Dunhill Ltd v. Sunaptic SA* [1979] FSR 337). The purpose of the affidavit is to set out the pertinent fact or evidence in regard to a particular matter in the suit. An affidavit cannot be used as an excuse to ventilate legal issues. Sinnathuray J remarked in *Re Application by Dow Jones (Asia) Inc* [1988] 1 MLJ 222:

> It seems clear to me that if affidavits were allowed to contain arguments there would be no need for the assistance of counsel at the hearing in court.

The case of *Myers v. Elman* [1940] AC 282, [1939] 4 All ER 484 HL laid down a sound principle of law to this effect: that a solicitor who has innocently put upon the file an affidavit affirmed by his client which he subsequently discovered to be false, must alert the court and put the matter right at the earliest possible time so long as that solicitor remained on record. The duty owed to the court cannot be over-emphasised and that duty continues *ad infinitum Yee Chang & Co Ltd v. NV Koninklijke Paketvaart Maatschappij* [1958] MLJ 131; *Mitra & Co v. Thevar & Anor* [1960] MLJ 79 CA; *Thomas v. Attorney General of Sarawak* [1961] MLJ 111; *Karpal Singh v. Atip Ali* [1987] 1 MLJ 291 SC; and *Re Howard E Cashin* [1989] 3 MLJ 129, HC Singapore. So much for the brief digression and now to proceed to the mainstream of the case. Both the second and third defendants have filed and served their defences. The first defendant has yet to do so. The conduct of the second and third defendants in filing and serving their defences showed

that they have taken the necessary steps in these proceedings and have thus forfeited their rights to stay these proceedings. Having taken the necessary steps to defend the action, the second and third defendants must be estopped from invoking their rights to stay these proceedings (*The Elizabeth H* [1962] 1 Lloyd's Rep 172). This was my judgment and I so hold accordingly. In *Ives & Barker v. Willans* [1894] 2 Ch 478, Lindley LJ aptly said at p. 484 of the report:

> The authorities show that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

Echoing the same sentiments, Luxmoore LJ said in *Lane v. Herman* [1939] 3 All ER 353:

> I think what was said by Lindley LJ is really the best guide to what is a step in the proceedings in a case of this kind. It must be a step taken in the proceedings in the technical sense if it is to be held to bar an application for a stay under section 4.

Surely, it was a technical and tactical move on the part of the second and third defendants when they filed their defences and that must be construed as having taken the necessary steps in these proceedings.

To me the taking of a step nullifies or removes the jurisdiction of the court to grant a stay (*Chappel v. North* [1891] 2 QB 252) and the court would, as a matter of course, refuse the stay.

Background Facts

Sometime towards the end of 1994, the plaintiffs were invited by the second defendant to enter into negotiations with a view to being appointed a sub-contractor of the third defendant. The second defendant, at all material times, represented the third defendant. The plaintiffs were given a good write-up and was favourably placed to secure a sub-contract for steel fabrication and erection works from the successful contractor of the Kuala Lumpur International Airport ("KLIA") project that was undertaken by the Government of Malaysia. That KLIA project was awarded by the Government of Malaysia to Perspec-Taisei-Kajima-Shimizu-Hazama consortium who in turn awarded a sub-contract to the third defendant for the supply, fabrication and erection of steel roof structures for the main terminal building ("MTB") and contact piers ("CP"). Now, the second defendant represented to the plaintiffs that the third defendant was their client and that the second defendant had been authorised and entrusted by the third defendant to secure a competent and reliable local contractor to undertake steel structural works on behalf of the third defendant for the KLIA project.

The second defendant was very cautious and due enquiries were made and flowing from it the second defendant was satisfied of the plaintiffs' competence and reliability. That being the case, the second defendant agreed to appoint the plaintiffs as the third defendant's sub-contractor to fabricate steel structures for the MTB and one of the two CPs of the KLIA project. Towards this end, a letter of intent dated 8 May 1995 was issued and under it the second defendant confirmed the plaintiffs' appointment as the third defendant's sub-contractor to fabricate steel structures for the MTB and the right side of the CP (all these would hereinafter be referred to as the "works"). It would be evident that the letter of intent played a major role in the whole case and that would definitely be referred to at the trial in order to ascertain and measure its full terms and effect. This seemed to be the tactical stand adopted by the plaintiffs. At the request of both the second and the third defendants, the plaintiffs commenced the works approximately in the month of August 1995 notwithstanding the fact that the formal contract had not been drawn nor executed between the three parties. When the plaintiffs commenced the works its only place of business was at their factory located in Pontian, Johore. But as the scope, magnitude and tight time schedule of the works required the plaintiffs to have an expanded factory premises, the plaintiffs became bold and proceeded to purchase a 5.6 acre site at Klang and dutifully constructed a new factory premise there in order to cope with the works. It must be emphasised that before the plaintiffs purchased the site at Kluang, the plaintiffs had relayed their intention of so doing and the second defendant had assented to the move. The plaintiffs too had intimated and impressed on the second defendant the heavy initial capital outlay and costs implications that would be incurred and these were stated on the first quotation dated 24 February 1995 bearing reference Q02-062/95 that was advanced to the second defendant which included a condition that an advance payment of 25% of the estimated contract price should be made to the plaintiffs. The same point was reiterated in the plaintiffs' revised quotation dated 15 March 1995 bearing reference no: Q02-062/95 (RI). The plaintiffs were concerned about finance. To meet and to defray the substantial costs of setting up the new factory at Kluang, the plaintiffs insisted and the defendants had magnanimously agreed to pay the plaintiffs an initial advance payment of 25% out of the estimated contract price of RM12,077,625 as set out in the letter of intent referred to earlier. The second defendant, somehow, dragged its feet and, in clear breach of the agreement, paid the plaintiffs RM2,166,510 sometime in November 1995 by way of an advance for "engineering fee" and a further sum of RM346,950 sometime in January 1996. These two payments were made together and they represented about 20% of the price.

Between March to April 1996, the second defendant forwarded a contract for the plaintiffs to execute with the first defendant on behalf of the second and third defendants – hereinafter referred to as the "said contract". The plaintiffs

were elated and they executed the said contract with the first defendant dated 19 November 1995 sometime in April 1996 and the plaintiffs returned the said contract to the second defendant for the first defendant's execution, but to date, the first defendant and the second defendant have failed, omitted and neglected to give the plaintiffs a copy of the said contract duly executed by the first defendant. The plaintiffs took the stand and adopted the position that save and except that the first defendant was named as a party to the said contract, the first defendant did not play any real or meaningful role in the plaintiffs' dealing. The first defendant too did not play any real or meaningful role in regard to the execution of the works. The plaintiffs were very forthright and they averred that the second and the third defendants were estopped from denying the course of dealings between the plaintiffs and them. On estoppel, Lord Cairns in *Hughes v. Metropolitan Railway Co* [1877] 2 App Cas 439 at p. 448 remarked aptly in these words:

> ... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results – certain penalties or legal forfeiture – afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforce, or will be kept in suspense, held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

In *Birmingham and District Land Company v. London and North Western Railway Company* [1889] 40 Ch D 268, Bown LJ elaborated Lord Cairns' speech in *Hughes (supra)* in these sound words:

> ... if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all placing the parties in the same position as they were before.

It is apparent that the equitable principle enunciated by Lord Cairns in *Hughes'* case *(supra)* appears akin or closely affiliated to the doctrine of estoppel and it certainly covers promises as well as statements of fact.

Birkett LJ in *Combe v. Combe* [1951] 1 All ER 767, 773 said that the equitable principle was a "doctrine which would enable a person to use it as a shield and not as a sword ... ." At p. 770 of the same case, Denning LJ had this to say:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect

> the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

The High Court of Australia in *Legione v. Hateley* [1983] 57 ALJR 292 examined the doctrine of promissory estoppel by reference to three classes of estoppel which are recognised in common law:

(a) estoppel of record;

(b) estoppel of writing; and

(c) estoppel in pais.

Both their Lordships Mason and Deane JJ preferred to categorise the doctrine of promissory estoppel within the doctrine of estoppel in pais. At p. 301 of the report the following passage appeared:

> *Estoppel in pais* includes both common law estoppel which precludes a person from denying an assumption which formed the conventional basis of a relationship between himself and another or which he has adopted against another by the assertion of a right based on it and estoppel by representation which was of later development with origins in Chancery. It is commonly regarded as also including the overlapping equitable doctrine of proprietary estoppel and estoppel by acquiescence or encouragement.

Now, the question to pose would be this. What was the manner of the estoppel in the present case? The estoppel was in the following manner: that the second and the third defendants chose to enter into the said contract with the plaintiffs by resorting to the corporate device of the first defendant which was said to be a mere sham and an abuse of the corporate form: that the first defendant merely acted as the agent and a mere cloak of the second and the third defendants. The plaintiffs averred that all the defendants should be treated together as one entity, one commercial unit in reference to the said contract with the plaintiffs and, consequently, all the defendants should be bound under the said contract. Alternatively, the plaintiffs held the view that the first defendant was the alter ego of the second and the third defendants. The plaintiffs contended that the first defendant was nothing more than a sham and that the course of dealings between the defendants was solely designed to project the first defendant as the contracting party when in reality and in fact the first defendant was a mere facade for the second and third defendants. In pursuance of the obligations under the said contract, the plaintiffs have proceeded to execute the works together with all the necessary variations as

required and as requested by the second and the third defendants. The plaintiffs averred that the defendants have failed and had neglected to pay the plaintiffs the full value for:

(a) the works executed;

(b) the variation works; and

(c) other additional works occasioned by the changes in the design.

The plaintiffs too averred that the defendants have also failed to refund to the plaintiffs the retention sum of 10% of the contract sums, the first moiety that was due within 45 days after the completion of the works and the second moiety of 5% of the contract sum that was due within 45 days after the expiry of the warranty period. The total sum claimed by the plaintiffs came up to a staggering figure of RM8,306,779.17 and the breakdown may be categorised as follows:

(i) balance of the amount due in respect of the sub-contract works (including the full retention sum of 10% of the sub-contract sum)

...RM3,173,584.61

(ii) balance of the amount due in respect of variation works

...RM3,262,906.80

(iii) amount due and forthcoming for additional works done for the RCP & MTB due to design changes

...RM2,541,118.04

(iv) less deduction for purchases made by the defendants on behalf of the plaintiffs

...RM 670,830.28
RM8,306,779.17

The plaintiffs also claimed for interest on various amounts that remained unpaid at 8% per annum under s. 11 of the Civil Law Act 1956 from the due dates to the date of judgment. The due date for the monthly progress payments was the 15th day of each month for invoices rendered before the 10th of each month. The due date for the refund of the first moiety of the retention sum was 45 days after completion of fabrication works which was in December 1996. The second moiety was to be refunded within 45 days after the warranty period which expired at the end of March 1997. The plaintiffs suffered tremendously and they incurred loss, damages and extra costs in respect of their factory operations in Pontian by reason of delay, hindrance,

and obstructions caused by the defendant, the defendants' servants or agents in the execution of the RCP works by the plaintiffs and the particulars were amply set out in the statement of claim. Since the defendants dragged their feet, the plaintiffs were further delayed in the construction of the Kluang factory which subsequently delayed the setting up of the blasting and painting facilities. The plaintiffs were compelled to accelerate the works to meet the site erection schedule in respect of the MTB and the particulars thereof were also set out in the statement of claim. Consequently, it was said that the plaintiffs have suffered loss and damage in these two areas:

(a) for the value of production loss of the factory in Pontian which was responsible for carrying out works in respect of the RCP

... RM1,024,026.30

(b) loss incurred by the plaintiffs in accelerating and expediting the works in respect of the MTB ... RM4,255,810.00

RM5,279,826.30

The plaintiffs had acted prudently. Pursuant to the said contract, the plaintiffs had obtained a banker's guarantee *vide* reference no: PG-9693 PB from Arab-Malaysian Bank Berhad ("bank") in favour of the first defendant. The banker's guarantee was due to expire on 31 March 1997. In order to secure the banker's guarantee, the plaintiffs had pledged a fixed deposit amount of RM502,692 to the said bank. The defendants were very sly. In breach of the terms of the sub-contract, the defendants delayed the delivery of the banker's guarantee to the plaintiffs after its expiry and only returned the banker's guarantee to the plaintiffs on or about 15 June 1998. The delay meant that the plaintiffs were unable to return the banker's guarantee after its expiry to the bank for cancellation until after 15 June 1998. The delay also meant that the plaintiffs were unable to utilise the fixed deposit amount for that period in order to reduce the plaintiffs debts owing under the overdraft facilities granted by the bank – the result was obvious: the plaintiffs have suffered loss and damage so the plaintiffs claimed interest at 12.9% per annum from 1 April 1997 to 15 June 1998 being the loss incurred by the plaintiffs as a result of the bank charges. The particulars of that loss were said to be:

Date of issue: 10 April 1996

Expiry date: 31 March 1997

Date of return of original banker's guarantee: 15 June 1998

The plaintiffs also suffered loss due to the late return of the original banker's guarantee, and the computation was as follows:

Fixed deposit amount as at the date of expiry at RM842,097.

The plaintiffs were very prudent and they itemised the losses sustained by them in these fashions:

Months	Interests	Accumulatives
April 1997	RM8,280.62	RM 8,280.62
May 1997	RM8,362.05	RM16,642.67
June 1997	RM8,658.96	RM25,301.63
July 1997	RM8,746.27	RM34,047.89
August 1997	RM8,870.97	RM42,918.86
September 1997	RM8,960.79	RM51,879.65
October 1997	RM8,977.02	RM60,856.66
November 1997	RM9,481.01	RM70,337.68
December 1997	RM9,770.65	RM80,108.33
January 1998	RM9,952.13	RM90,060.46
February 1998	RM10,564.45	RM100,624.91
March 1998	RM11,391.22	RM112,016.14
April 1998	RM11,687.89	RM123,704.02
May 1998	RM11,871.30	RM135,575.33
15 June 1998	RM5,946.39	RM141,521.72

The interest earned from fixed deposit was listed as follows:

(a) amount at date of expiry RM842,097;

(b) amount at date of return RM892,820.23;

and the net loss suffered was said to be in the region of RM90,798.49.

For these reasons, the plaintiffs claimed for the following orders:

(a) for an order that the veil of incorporation of the defendants be lifted;

(b) for judgment against the defendants for the sum of RM8,306,779.17;

(c) interest on the aggregate of the sum of RM8,306,779.17 at the rate of 8% per annum under s. 11 of the Civil Law Act 1956 from the due dates until payment;

(d) judgment against the defendants for the sum of RM5,279,826.30;

(e) interest at 8% per annum on RM5,279,826.30 from the date of filing until realisation;

(f) judgment against the defendants for the sum of RM90,798.49 together with interest at 8% per annum with effect from 16 June 1998 until realisation;

(g) costs; and

(h) such further orders or other reliefs as this Honourable Court deems fit and just.

These facts showed the gravamen of the whole matter.

Enclosure 19

I shall now proceed to examine encl. 19. Clearly the basis of the first defendant's application to stay proceedings pending reference to arbitration centred on the contract that was purportedly made on 19 November 1995 between the plaintiffs and the first defendant as seen in encl. 18 exhibit marked "SS1". That contract as seen at p. 8 of encl. 18 was not executed by the first defendant. There was a failure, a neglect and an omission on the part of the first defendant to execute the contract. In spite of repeated requests by the plaintiffs, the first defendant simply refused to execute the contract. In *Heller Factoring Sdn Bhd (previously known as Matang Factoring Sdn Bhd) v. Metalco Industries (M) Sdn Bhd* [1995] 2 MLJ 153, Mahadev Shankar JCA (as he then was) was of the view that the fact that the appellant there had not dated or signed the sale and purchase agreement did not mean that there could be no concluded contract. His Lordship was also of the view that where a contract had been signed by one party only, it could be enforced where there was evidence, such as part performance by one party and acceptance by the other, that the other party had elected to be bound by it. Somewhere in the course of the judgment his Lordship observed:

> The document upon which Matang obtained Peh's signature on 3 February 1986 was not the standard 'Offer to purchase' but the standard sale and purchase agreement. The price of RM65,000 was entered into the third schedule agreement. The guarantor signed as a witness. It was strenuously submitted that because Matang had not dated or signed this document, there could be no concluded contract. We are unable to subscribe to this view. The true position is that where a contract has been signed by one party only, it can be enforced where there is evidence that the other party has elected to be bound by it. (See the cases in 12 *English and Empire Digest (Contract)* at page 193 paragraph 1166 where *Buckhouse v. Crossby* [1737] 2 Eq Cas Abr 32; 22 ER 28 and other cases are referred to). Part performance by one party, accepted by the other, is such other evidence. Delivery on 19 February was part performance.

It was in these circumstances that the plaintiffs, throughout the period of execution of the contract works, was left with the cloud of anxiety and uncertainty as to who the real contracting party was. Mr. M. Pathmanathan, learned counsel for the plaintiffs, was on the right track when he posed this pertinent question: How could the first defendant say that they should go for arbitration if the first defendant has yet to sign the contract? It was this unsigned contract that contained the arbitration clause. In *Suncast Sdn Bhd (No: Syarikat 296921-W) v. Padang Indah Sdn Bhd (No: Syarikat 206187-A)*, an unreported decision, I had occasion to deal with the same problem when I said at p. 11:

> That arbitration agreement was dated June 24, 1996 and surprisingly at page 3 thereof the signature of the plaintiff was nowhere to be seen. The spaces for both 'signature' and 'name' of the plaintiff as the contractor were left blank.

At p. 22 of the same judgment in the same case, I rounded it up by saying:

> Bereft of the arbitration agreement, the defendant had no leg to stand on. Without clause 34 of the arbitration agreement, there was nothing to arbitrate and, consequently, section 6 of the Act was not applicable.

In my judgment, since the first defendant did not sign the contract the dispute between the plaintiffs and the first defendant can never be referred to arbitration. It was wishful thinking on the part of the first defendant to refer the dispute to arbitration.

It must be recalled that the defendants chose to name the first defendant as the formal party to the written contract – which the first defendant saw it fit not to execute the same. It must also be recalled that the first defendant did not play any real or meaningful role in executing the works under the contract and from the factual matrix of the whole case the plaintiffs' dealings were principally between the second and the third defendants. Of pertinence would be the fact that throughout the duration of the contract, the second and the third defendants conducted themselves in such a way and in such a fashion and they dealt with directly with the plaintiffs and led the latter to believe as if they were for all intents and purposes the contracting parties with the plaintiffs. A search with the registrar of companies (see exh. "GNB1" of encl. 35") showed an alarming set of facts. It was this. That the first defendant's former name was Mitsui & Co (Malaysia) Sdn Bhd – the present name of the second defendant with the exception of the word "Malaysia". The search also disclosed that the second defendant was a substantial shareholder in the first defendant and both of them have a common business address. The first defendant exhibited a contract marked as "SS2" through an affidavit affirmed by Mr. S. Sagadeva as seen in encl. 18, which contract was between the third defendant and the first defendant and it was pointed out that there was in existence an arbitration clause in the contract. This was not well

received by the plaintiffs. It was rightly submitted by Mr. M. Pathmanathan that the plaintiffs were not concerned with the dealings between the defendants themselves and the only concern of the plaintiffs was that the cause of action instituted by the plaintiffs concerned each and every one of the three defendants cited therein.

The defendants contended that the plaintiffs statement of claim disclosed the issue of fraud. That contention constituted compelling ground that the disputes between the parties ought not to be arbitrated but rather litigated in a court of law. Section 25(2) of the Arbitration Act 1952 is a specific provision and it gives the power to the High Court to order that an arbitration agreement shall cease to have effect and directing the issue to be tried by the High Court if the issue of fraud is raised. The original text of s. 25(2) of the Arbitration Act 1952 enacts as follows:

> Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by virtue of the agreement.

Fraud goes to integrity and the courts are capable of handling the matter. In *Radford v. Hair & Ors* [1971] 2 All ER 1089, there were allegations akin to allegations of fraud and the court held that it should be adjudicated by a judge in open court instead of referring the matter to arbitration. Pennycuick VC in fine language said at p. 1093 of the report:

> Turning back to the present case it seems to me that the allegation summarised in para 4(d) of the affidavit does certainly impute to the plaintiff actual dishonesty. It alleges, first, that he has been engaged on behalf of clients one of whom was merely a private company in which he had an interest; secondly, that he made a false statement as to the anticipated profit of the branch; and thirdly, that he made a false statement concerning a certain arrangement with Essex and Suffolk Properties Ltd. Those are all contentions involving actual dishonesty. They also necessarily involve his professional reputation as any charge of dishonesty must do. It is quite true that fraud is not specifically mentioned in that sub-paragraph, but it seems to me to bring the case within the principle on which an allegation of fraud is to be regarded as sufficient reason for taking the case away from arbitration and letting it be decided by the court. The principle must be equally applicable in a case where actual dishonesty is alleged, even though the word 'fraud' is not mentioned, and that must be at least as much so, in the case where professional reputation is involved, as in any other case.
>
> Counsel for the defendants put it in this way. He said that para. 4 of the affidavit merely alleges a breach of the contractual obligation contained in

> cl. 20 of the partnership deed, *ie*, 'to be just and faithful to the others of them', and is not an allegation of fraud. He says that the defendants do not and need not allege fraud, nor, indeed, dishonesty. That is a subtle argument, but it seems to me that it is difficult to allege a breach of an obligation 'to be just and faithful to the others' without implying also an allegation of dishonesty. I do not want to put that too high. There may be instances in which a partner could behave unfaithfully to the others without being actually dishonest, though it is not altogether easy to see how that could arise. It will be sufficient to say that, in the present case, the allegation of unfaithfulness is of such a character that to my mind it does clearly involve an allegation of dishonesty. I do not think one can escape from the principle laid down in the cases which I have cited merely by saying that because the allegation is, on the face of it, an allegation of breach of contract it is not an allegation of fraud or dishonesty.
>
> I conclude that the plaintiff is entitled to have this case tried by a judge in open court so that he can meet these allegations of dishonesty against him.

In the same vein, Abdul Hamid J (who later rose to be the Lord President of the Supreme Court) said in *Malaysia Government Officers' Co-operative Housing Society Ltd v. United Asia Investment Ltd & Ors* [1972] 1 MLJ 113, 115:

> Having regard to the circumstances of this particular case and in the light of the pleadings and the affidavits before this court, I am satisfied that one of the substantial matters at issue is the question of the perpetration of fraud or something in the nature of fraud on the part of the first defendant company, a matter which it would seem to me to be outside the arbitrator's power to decide. In my view this is not the type of dispute that should be properly referred to an arbitrator. In other words I am satisfied that good grounds exist why this particular dispute should not be submitted to an arbitrator. I therefore refuse the application to stay proceedings to refer to arbitration.

The then Supreme Court through Wan Suleiman SCJ in *Lai Siew Wah Sdn Bhd v. Ng Chin* [1988] 1 MLJ 393, 394 aptly said:

> Once the court below is satisfied that there is a *bona fide* allegation of fraud against the appellant, a finding with which we would agree, then the discretion given to the judge under section 25(3) of the Arbitration Act 1952 was indeed properly exercised.

In *Monro v. Bognor UDC* [1915] 3 KB 167, (1914-15) All ER Rep 523 the plaintiff a contractor, alleged that he had been induced to enter into a building contract by fraudulent misrepresentation and he brought an action to recover damages for the alleged misrepresentations and to have the contract declared void. The defendants took cudgel and applied to stay the proceedings and to refer the disputes to arbitration under the arbitration clause in the contract, which was a wide one and embraced disputes 'upon or in relation to or in connection with the contract'. The Court of Appeal held that the defendants

were not entitled to have the proceedings stayed. Pickford LJ in his judgment boldly said that the claim for damages for fraudulent misrepresentation was not in relation to or in connection with the contract, within the meaning of the arbitration clause. Bankes LJ said [1915] 3 KB 167 at p. 172, [1914-15] All ER Rep 523 at 526:

> ... the essence of the claim is that the plaintiff is asserting that he was induced by fraud to enter into a contract, and that as a consequence the contract was never binding.

To me these last words indicate a *ratio* for the decision which is clearly right and should be followed: an arbitrator cannot have jurisdiction to decide that the contract under which he is appointed is void or voidable, since by so doing the arbitrator would be destroying the very rubric and basis of his own position.

It is now trite law that the existence of an allegation of fraud is sufficient and a good ground for refusing a stay. It is only fair and a good judicial practice that a party against whom a serious charge is made should have the opportunity of ventilating their case in open court. It has been said since time immemorial that a judge is better equipped and certainly capable of dealing with an issue like fraud than an arbitrator (*Wallis v. Hirsch* [1856] 1 CBNS 316). These basic principles equally apply whether the allegation of fraud is made by the defendant or the plaintiff. If the allegation of fraud is made by the defendant, then the principle applies as a matter of course. If the allegation of fraud is made by the plaintiff the principle equally applies.

Russel v. Russel [1880] 14 Ch D 471 was a case where the court had to consider whether a stay should be granted. That was a case of a partnership dispute between two brothers. One brother had determined the partnership or for that matter had purportedly terminated the partnership while the other brother alleged fraud. The brother against whom the charges were made was interested in referring the matter to arbitration while the other brother opposed the idea of arbitration. Jessel MR at p. 481 of the report observed:

> I am satisfied that the mere making of a charge will not do that, even in a case where the Court ought to exercise its discretion by refusing to refer the case to arbitration. There must be sufficient *prima facie* evidence of fraud, not conclusive or final evidence, because it is not the trial of the action, but sufficient *prima facie* evidence.

My understanding of *Russel v. Russel (supra)* is simply this. Firstly, that a party accused of fraud can require trial in open court if a substantial case is made out against him. Secondly, the court would refuse to refer the case to arbitration when there is a sufficient *prima facie* evidence of fraud.

In my judgment this was not a case in which I was prepared to stay the action. I have since perused through the statement of claim and the plaintiffs had not alleged fraud or misrepresentation therein. The plaintiffs prayed for the lifting of the corporate veil because the course of conduct and circumstances justified the lifting of the corporate veil. In the statement of claim, the plaintiffs contended that the first defendant was the alter ego of the second and third defendants. The plaintiffs also contended in the statement of claim that the first defendant was a sham and that the course of dealings between the defendants was designed to project the first defendant as the contracting party when in reality and in fact the first defendant was a facade for the second and third defendant. In *Trade Facilities Pte Ltd & Ors v. Public Prosecutor* [1995] 2 SLR 475, an appeal from the magistrate's court to the High Court, Yong Pung How CJ Singapore sitting in the High Court agreed with the magistrate that that was an appropriate case to lift the corporate veil. In *The "Asean Promoter"* [1982] MLJ 108, the Singapore High Court through Abdul Wahab Ghows J, lifted the veil of incorporation. But the defendant, as I said, contended that the plaintiffs' statement of claim disclosed an issue on fraud. That being the case I say and hold that the issue of fraud cannot be dealt with under the arbitration clause. Justice will be secured, at its peak, if this court retained control of the whole action.

Enclosure 22

Messrs Skrine & Co, a firm of solicitors, entered appearance for the second defendant. Thereafter the law firm by letter dated 7 April 1999 requested the plaintiffs' solicitors for an extension of time of three weeks "in order to file our clients' defence". After receiving instructions, the plaintiffs' solicitors acceded to the request and by letter dated 8 April 1999 granted the second defendant an extension of time of two weeks commencing from 10 April 1999 to file and serve their defence. But by letter dated 23 April 1999, the second defendant's solicitors, instead of filing the defence for the second defendant, served on the plaintiff's solicitors an advance copy of their application to stay proceedings and requested for a deferment of filing the statement of defence until the application for a stay was disposed of. Naturally, the plaintiffs were taken aback by this sudden turn of events because the extension of time was granted on the premises that the second defendant undertook to file their statement of defence and not to make an application to the contrary. The plaintiffs' solicitors took a tough stand and by letter dated 26 April 1999 refused to accede to the second defendant's solicitors request. The second defendant's solicitors then purportedly filed the statement of defence for the second defendant without prejudice to their application for a stay. Clearly, the stand adopted by the second defendant's solicitors left much to be desired. It was not open to the second defendant to file their statement of defence and at the same time – in fact, within the same breath, to contend that they had

not taken a step in the proceedings. The second defendant had unequivocally undertaken to file their statement of defence by requesting for an extension of time for that purpose. The plaintiffs were led to believe that the second defendant intended to file their statement of defence and at the same time to proceed to defend the suit. By their own conduct, the second defendant must be estopped from contending otherwise.

Through the affidavit of Toshiya Adachi, the message that the second defendant was unwilling or "loathe to be involved in any form of litigation" was relayed. This court, a constitutionally constituted tribunal to adjudicate on any dispute in a fair, just and expeditious manner, must view with askance anyone who is loathe to appear before it. Toshiya Adachi was even bold and had the audacity to accuse the plaintiffs of "using the court to apply pressure" on the second defendant. It was an incomprehensible attitude. If adjudicating a dispute in a court of law constitutes pressure then the same would equally be true when one refers a dispute to arbitration. The unwillingness of the second defendant to go to court meant that they valued the privacy of an arbitration. If that was the reason, then there was every reason for these proceedings to proceed to open court trial and not be shrouded in total secrecy.

Enclosure 14

The third defendant filed their statement of defence and this was a step taken to bring the matter to the court. On numerous occasions, the third defendant held themselves out as a party liable to the plaintiffs. A good example would be the letter dated 12 January 1998 as seen in exh. "GNB14" of the affidavit of Goh Nai Boon. It must be emphasised that the plaintiffs' claims against the second and the third defendants were not based on a written contract and, consequently, the plaintiffs' claims against them were not governed by the arbitration clause. This meant that the plaintiffs have no choice but are compelled to file these proceedings against the second and the third defendants in a court of law and not by way of arbitration proceedings. The scenario would be this: if the stay was granted in favour of the first defendant, then there would be two sets of proceedings. One by the plaintiffs against the first defendant by way of an arbitration. The other would be by the plaintiffs against the third defendant arising out of the same set of facts in a court of law. The plaintiffs will then have to revert to this court to prosecute their claim against the second and the third defendants in order to lift the corporate veil. There would thus be a multiplicity of proceedings. Viewed in its correct perspective, it would certainly be convenient, cost saving and judicially expedient to have all the issues between the plaintiffs and the defendants adjudicated in a single proceeding. The same would also be true in regard to the issues between the defendants themselves which could be effectively tried and completely determined and adjudicated upon in a single proceeding. In my judgment, a

multiplicity of suits resulting in conflicting decisions can be avoided by proceeding with this suit in this court as there were common questions of facts among the parties that were inextricably linked to one another. In the same vein, Lord Denning MR in *Taunton Collins v. Cromie And Another* [1964] 2 All ER 332 CA, aptly said at p. 333 to p. 334 of the report:

> ... It seems to me most undesirable that there should be two proceedings in two separate tribunals – one before the official referee, the other before an arbitrator – to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay. Furthermore, as counsel for the plaintiff pointed out, if this action before the official referee went on by itself – between the plaintiff and the architect – without the contractors being there, there would be many procedural difficulties. For instance, there would be manoeuvres as to who should call the contractors, and so forth. All in all, the undesirability of two separate proceedings is such that I should have thought that it was a very proper exercise of discretion for the official referee to say that he would not stay the claim against the contractors. Everything should be dealt with in one proceeding before the official referee.
>
> There are only two authorities which I need mention. One is *W Bruce, Ltd. v. J Strong* [1951] 1 All ER 1021; [1951] 2 KB 447. It concerned a mercantile contract for the supply of figs which had been sold down through a chain of merchants. Two people in the chain were members of the trade association. The contract contained the trade arbitration clause. This court held that the arbitration should not be stayed. I cannot regard that case as an authority on the way discretion should be exercised. It was a very special case.
>
> The other authority is *Halifax Overseas Freighters, Ltd v. Rasno Export (The "Pine Hill" case)* [1958] 2 Lloyd's Rep. 146 before McNair, J. It was a shipping case. There was an arbitration clause in a charterparty, but no arbitration clause in the bills of lading. There was a claim for general average contribution. The ship owners brought an action against the bill of lading holder and the charterers. The charterers, relying on the arbitration clause, applied to stay the proceedings against them. McNair, J., held that they should not be stayed. Everything should be dealt with in the one action. He pointed out that there was the risk of inconsistent findings of fact; that there were difficult questions of law which might come up to the court; and that the charterers had themselves put forward the bills of lading for inspection without an arbitration clause in. He treated those reasons as cumulative. Then he added a reason which seems to have impressed him most [1958] 2 Llyod's Rep. at p. 152:
>
> > I think that a serious risk would be run that our whole judicial procedure, at any rate in relation to this claim, would be brought into disrepute if, as I have indicated, there was a serious possibility of getting conflicting questions of fact decided by two different tribunals ... .

That observation applies to this case as to that.

Writing a concurring judgment in the same case, Pearson LJ said at p. 334 of the report:

> The other principle is that a multiplicity of proceedings is highly undesirable for the reasons which have been given. It is obvious that there may be different decisions on the same question and a great confusion may arise.

As far back as 1889, the English Court of Appeal was very wary and took measures to prevent a multiplicity of proceedings. This is clearly evident in the case of *Turnock v. Sartoris* [1889] Ch D vol XL 111, 150, where Cotton LJ writing a separate judgment for the Court of Appeal in fine language said at p. 156 of the report:

> ... It cannot be right to cut up this litigation into two actions, one to be tried before the arbitrator, and the other to be tried elsewhere. Even if the arbitration clause should be construed so as to include all matters in respect of which damages are claimed by the Plaintiff, yet I should not think it right to refer the case to arbitration, because there are questions arising as to the construction of the agreement and its effect on the provisions of the previous lease, and these questions would not come within the powers of the arbitrators. I think it would not be reasonable to refer the case to an arbitrator who could only deal with the questions arising under the lease, and would not be competent to deal with other questions which might arise under a reference referring to him all matters which are in difference between the parties. Whether or not it will be reasonable, when the Plaintiff knows what the defence put in by the Defendants is, to refer the whole matter, is another question.

Echoing the same sentiments, Bowen LJ said in *Turnock v. Sartoris (supra)* at p. 156 of the report:

> The only word I will add is to recommend that as soon as the defence has been put in the parties should consent to the cause being tried by an official referee. I think the case is one which it is the duty of the solicitors on both sides to refer, otherwise there will be a double expense and a double litigation.

In *Halifax Overseas Freighters, Ltd v. Rasno Export; Techno Prominport; And Polskie Linie Oceaniczne PPW (The 'Pine Hill')* [1958] Lloyd's List Law Reports, vol. 2, 146 at p. 152, Mr. Justice McNair observed:

> ... ; but I think that the cumulative effect of them all is such as to satisfy me, without any doubt at all, that here there has been shown sufficient reason why the claim of the shipowners against the time charterers should not go to arbitration. I think that a serious risk would be run that our whole judicial procedure, at any rate in relation to this claim, would be brought into disrepute if, as I have indicated is a serious possibility, you get conflicting questions of fact decided by the two different tribunals, quite apart from the other matters which I have mentioned.

The issues of lifting the corporate veil involved complex legal technicalities and only the High Court as opposed to a single arbitrator would be able to effectively adjudicate on the matter. Massive problems exist in performing the exercise commonly called lifting the corporate veil. To me this expression means that although whenever each individual company is formed a separate legal personality is created and so the courts will invariably look behind the legal personality to see and ascertain who the real controllers are. The author by the name of John H Farrar in his book entitled "*Company Law*", Butterworths, London, 1985, at p. 57 succinctly said:

> It is difficult to rationalise the cases except under the broad, rather question – beginning heading of policy and by describing the main legal categories under which they fall. These are (1) agency, (2) fraud, (3) group enterprises, (4) trusts, (5) enemy, (6) tax, (7) the Companies Act itself.

In *Aspatra Sdn Bhd & 21 Ors v. Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97 SC, Mohamed Azmi SCJ at p. 103 had this to say of the need to lift the corporate veil:

> The court would generally lift the corporate veil in order to do justice particularly when an element of fraud is involved although the consequences of lifting the veil would vary according to the circumstances of each case. Sometimes the consequences may be in favour of the companies and yet at another time they may be against them. (See *Palmer's Company Law* by Schmitthoff, volume 1, 23rd edition at page 210).

As I said Abdul Wahab Ghows J in *The "Asean Promoter" (supra)* had no hesitation in lifting the veil of incorporation. All the reasons advanced in this judgment must surely be construed in favour of the plaintiffs and when so construed the applications for stay and reference to arbitration by the defendants must fall like a deck of cards. This was a fit and proper case to decline to exercise my discretion in favour of staying these proceedings. Borrowing the words of Mr. Justice Tomlin in *Navarino Salvors, Ltd v. Navarino Recovery, Ltd* [1925] Lloyd's List Law Report, vol, 23, at p. 36 particularly at p. 37 of the report where his Lordship said:

> Some of the questions raised involve somewhat obscure questions of law, and there is a good deal of complication in the dispute. I am satisfied that it would be improper, if not impossible, to sever one question from another, and, therefore, having regard to all the circumstances of the case, and giving it the best consideration I can, and having regard to the nature of the relief which it may be necessary at some stage to grant, I am satisfied that justice will best be secured if the Court retains control of the whole action.

Justice too would be secured and upheld if this court retained control of the whole proceedings and proceed to adjudicate on all the issues ventilated before it in open court. The plaintiffs, in my judgment, had successfully demonstrated

that the disputes between the parties should not be arbitrated (*Perbadanan Kemajuan Negeri Perak v. Asean Security Paper Mill Sdn Bhd* [1991] 3 MLJ 309). Abdul Malek Ahmad J (now FCJ) in *Kong Wah Housing Development Sdn Bhd v. Desplan Construction Trading Sdn Bhd* [1991] 3 MLJ 269 adopted the correct approach in construing the effect of an arbitration clause when his Lordship said that such a clause did not oust the jurisdiction of the court but rather the court was given a discretion whether to grant a stay pending arbitration or otherwise. In this case, however, I refused to grant a stay of these proceedings. I have no qualms in dismissing encls. 19, 22 and 14 with costs.

Enclosure 69

This was an appeal to the Judge in Chambers against the decision of the senior assistant registrar ("SAR") who gave summary judgment in favour of the plaintiffs against the first defendant for the sum of RM7,675,328.76 together with interest at 8% per annum from the date of the summons in chambers in encl. 31 until realisation and costs. In encl. 31, the plaintiffs averred that the first defendant had no defence to the plaintiffs' claim for the sum of RM7,675,328.76. The plaintiffs too averred that the first defendant had admitted that that amount was due and owing to the plaintiffs. The affidavit in support of enclosure 31 was affirmed by Goh Nai Boon on May 4, 1999 as seen in enclosure 30 and there Goh Nai Boon deposed the affidavit in his capacity as the managing director of the plaintiffs' company and he said that the matters deposed thereto were true and within his own knowledge and from the plaintiffs' documents to which he had full and unrestricted access. Goh Nai Boon deposed that the first defendant is and was at the commencement of this action, justly and truly indebted to the plaintiffs in the aggregate sum of RM13,677,405.96 in respect of works done and materials supplied, losses and costs incurred by the plaintiffs in respect of the supply, fabrication and erection of the steel roof structures for the MTB and CP for the KLIA project. The particulars of the said claim were said to be incorporated in the endorsement in the writ of summons in the present action. Goh Nai Boon deposed that it was within his own knowledge that the said debt was incurred and is still due and owing. Goh Nai Boon also deposed that on the plaintiffs' instructions that the plaintiffs' solicitors issued a statutory notice of demand dated 7 October 1997 pursuant to s. 218 of the Companies Act 1965 against the first defendant demanding the sum of RM15,509,268.71 to be paid within 21 days and the said notice was annexed and marked as exh. "GNB1" and reproduced herein for convenience:

YUSUF KHAN & PATHMANATHAN
Peguambela & Peguamcara/Advocates & Solicitors

Your Ref:
Our Ref: B.88/16/P/tkb(lit)

7 October, 1997

Received 7 OCT 1997
TEJANA TRADING

TEJANA TRADING CORPORATION SDN BHD
5TH Floor, Regent Office
160 Jalan Bukit Bintang
Kuala Lumpur

BY HAND

Dear Sirs,

Re: NOTICE OF DEMAND
SECTION 218 COMPANIES ACT, 1965
SUM OF RMl5,509,268.71 DUE AND OWING TO
BOON CHANG (M) ENGINEERING & CONSTRUCTION SDN BHD

We act for Boon Chang (M) Engineering & Construction Sdn Bhd of No. 3, Jalan Mahsuri 2, Kawasan Perindustrian Kluang 1, 86000 Kluang, Johor.

Our instructions are that pursuant to a written Agreement entered into between your goodselves and our clients dated 19th November, 1995, our clients had discharged all their obligations thereunder including the execution of extra works and services and that a sum of RM15,509,268.71 is due and owing from your goodselves to our clients, full particulars of which have been rendered to you.

Our instructions are to demand from you, which we hereby do, the said sum of RM15,509,268.71 to be paid to our clients within 21 days of service of the Notice on you failing which you will be deemed unable to pay your debts pursuant to Section 218 of the Companies Act, 1965 and we shall proceed to present a Winding-Up Petition against you without further reference.

Sgd. (Pathma)

SOLICITORS FOR BOON CHANG (M)
ENGINEERING & CONSTRUCTION
SDN BHD

c.c. Clients

The first defendant by their solicitors letter dated 6 November 1997 responded to the plaintiffs' statutory demand denying that the sum of RM15,509,268.71 was due and owing but admitted to an outstanding sum of RM7,675,328.76. That admission by letter was exhibited and marked as exh. "GNB2" and it was worded thus:

SKRINE & CO
Advocates & Solicitors, Notaries Public
Registered Patent Agent, Trade Mark Agent

Your Ref: B.88/16/P/tkb(lit)
Our Ref: AK/WCL/AMR/sn/1974707.7

6 November 1997

Received 12 NOV 1997
Yusof Khan & Pathmanathan Kuala Lumpur

M/s Yusuf Khan & Pathmanathan
Advocates & Solicitors
Suite lB, 1st Floor, The Tower
Plaza Pekeliling
Jalan Tun Razak
50400 Kuala Lumpur

Dear Sir,

NOTICE OF DEMAND
SECTION 218 COMPANIES ACT, 1965

We act for Tejana Trading Corporation Sdn Bhd of 5th Floor, Regent Office, 160 Jalan Bukit Bintang, Kuala Lumpur.

We refer to your purported Notice pursuant to Section 218 of the Companies Act 1965 to our clients dated 7 October 1997.

Our clients categorically dispute the amount of RM15,509,268.71 claimed by your clients and deny that they are liable to pay your clients the said sum or at all for the following reasons:

(i) the said sum of RM15,509,268.71 is not a liquidated sum nor a certified sum.

(ii) for example the claim made by your clients for RM869,336.55 in respect of Joint Casting A/B/C. Our clients are not agreeable to your client's claim because the weight of casting are much heavier than the weight of the regular steel materials and therefore the claim made for joint casting A/B/C based on the unit price of MTB are not justifiable.

(iii) Our clients have on all occasions made payments earlier than the due date in respect of progress payments and therefore the claim for late payment alleged by your clients appears to be baseless.

(iv) Our clients were not late in making payments in respect of Variation Orders as there was a need to assess these claims before any payment or at all can be made.

(v) Our clients are rightfully entitled to the sum of RM1,625,362.53 referred to as item 18 in the attached table on the basis of various breaches of contract on the part of your client.

(vi) It has always been within your clients' knowledge that your clients' total claim is for the sum of RM20,237,346.85 and our clients have made payments amounting to RM12,562,018.09. The outstanding balance claimed by your clients is therefore RM7,675,328.76. Your clients have inflated the current claim to RM15,509,268.71. Your client's claim is not only inconsistent but baseless.

(vii) Our clients cross-claim amounts to a sum in excess of the amount claimed by your clients consisting of:

(a) damages for your clients' defective work;

(b) damages for delays caused to the Works due to your clients failure to adhere to the schedule of works under the contract; and

(c) damages for termination including loss of profits and other consequential loss incurred as a result of termination of the said contract.

TAKE NOTICE that our clients have various banking facilities which makes a presentation of a winding up petition against our client an event of default. TAKE NOTICE that any presentation of a winding up petition by your clients will affect the financial position of our client and this will result in our clients incurring huge financial losses. Unless your clients undertake not to present a winding up petition against our clients, our clients will have no alternative but to institute the necessary legal proceedings to restrain your client from doing so and shall hold your clients responsible for damages as a result of the winding up petition being presented. TAKE FURTHER NOTICE that the presentation of a winding up petition by your clients will be an abuse of the process of court and an act of oppression.

Yours faithfully,

Sgd. (Illegible)

c.c. client
Attn: Mr. K Kato
By fax no: 2497380/Post

Goh Nai Boon categorically deposed that he verily believed that the first defendant had no defence to the admitted portion of the plaintiffs' just claim and accordingly he prayed that judgment be entered for the admitted sum of RM7,675,328.76 while the balance thereof to proceed to trial.

Ashok Kumar a/l L Mahadev ("Ashok"), a legal assistant with the firm of Messrs Skrine & Co., affirmed an affidavit in encl. 50 on 25 June 1999 by

way of a reply to encl. 30. Ashok deposed that affidavit as one of the solicitors who had acted on behalf of the first defendant previously in response to the s. 218 notice that was served by the plaintiffs on the first defendant. Ashok then referred to the same letter marked as exhibited "GNB2" of encl. 30 (hereinafter referred to as the "admission letter"). Ashok deposed that the contents of the admission letter were self explanatory and that what they were trying to convey and what was conveyed in para. 3 (vi) of the admission letter was the following:

(a) that from the outset the first defendant categorically denied the sum of RM15,509,268.71 claimed by the plaintiffs and denied its liability to pay to the plaintiffs the said sum or at all.

(b) That the plaintiffs' stand was and is to the effect that its claim against the first defendant came up to RM20,237,340.85

(c) that the first defendant paid the plaintiffs RM12,562,018.09 because the first defendant's stand was and is to the effect that the amount owed was only RM12,562,018.09.

(d) it was to demonstrate that the plaintiffs' claim was one which was inflated, inconsistent and without foundation.

(e) that the plaintiffs' claim of the sum of RM15,509,268.71 was inconsistent with its stand and claim as per para. (b) above.

(f) that the figure of RM7,675,328.76 was inserted so as to correct the plaintiffs and to point out to the plaintiffs that its claim will be consistent with its stand in para. (b) above only if the figure of RM7,675,328.76 was and is claimed.

The first defendant was unhappy with Ashok's affidavit in encl. 50 and the first defendant through Daisuke Sugiura affirmed an affidavit in encl. 51 on 25 June 1999 as a response to encl. 30. In encl. 51, Daisuke Sugiura, a director of the first defendant, deposed that notwithstanding that the plaintiffs were in breach of the contract and had caused the first defendant substantial loss, the plaintiffs put forward unsubstantiated claims against the first defendant. These claims were said to be disputed by the first and the third defendants. Daisuke Sugiura deposed that the first defendant was shocked to receive the s. 218 notice from M/s Yusof Khan & Pathmanathan. Daisuke Sugiura then deposed that the first defendant's solicitors Messrs Skrine & Co responded as can be seen in the admission letter and subsequently the plaintiffs withdrew their threats to wind-up the first defendant. Daisuke Sugiura then deposed as to the financial background to the case by referring to the statement of account marked and exhibited as exh. "DS7". Daisuke Sugiura deposed that after allowing for the retention sums, the first defendant had paid the plaintiffs a

total of RM12,562,018.09 for the works carried out. But, so it was deposed, that the plaintiffs had rendered several invoices for various claims and inflated their total claim before deducting the payment of RM12,562,018.09 to a staggering sum of RM20,237,346.85. It was deposed that the main contractors and the third defendant did not agree with the quantum of claims advanced by the plaintiffs in respect of the MTB and the CP. The plaintiffs' claim for design change was said to be a fiction. It was deposed that the KLIA design was neither changed by the Government of Malaysia nor by the main contractors. It was said that the first defendant had no authority to change the design and in this context the first defendant did not do so. It was also said that the plaintiffs' claim for the interest on overdue payment arose from the disputed sums claimed by the plaintiffs. Daisuke Sugiura then deposed that the first defendant claimed the sums of:

(i) RM93,308 for the on-site rectification of the defective work by the plaintiffs;

(ii) RM5,332,120 for cost over-runs resulting from the plaintiffs' delay and defective work;

(iii) RM1,091,607.23 for the cost of engaging another contractor namely Messrs Geachin to complete the works, which should be within the plaintiffs' scope of works, for contact piers 2 and 3 and this was done after the termination of the sub contract with the plaintiffs; and

(iv) RM1,625,372.27 for various additional works and costs suffered and incurred by the first defendant.

It was deposed that out of these sums, the plaintiffs merely admitted the sum of RM670,830.28 in respect of the first defendant's claim. It seemed that the details of how these sums were arrived at had been forwarded to the plaintiffs on various occasions.

Daisuke Sugiura deposed that the third defendant had offered on several occasions together with the first defendant to refer all the disputes to arbitration. Daisuke Sugiura deposed further that the first and the third defendants were able and willing to adduce evidence to show: (1) that the plaintiffs had breached the contract; (2) that they had incurred losses; and (3) to rebut the plaintiffs' claims. For all these reasons, Daisuke Sugiura prayed that the plaintiffs' application for summary judgment be dismissed with costs.

Goh Nai Boon responded to encls. 50 and 51 by affirming an affidavit in reply in encl. 61 on 7 July 1999. In regard to Ashok's affidavit in encl. 50, Goh Nai Boon responded in the following manner:

(1) He was advised by his solicitors and verily believed that it was neither the norm nor the conduct condoned by the court for a solicitor to affirm an affidavit pertaining to the merits or otherwise of his erstwhile clients.

(2) Ashok's affidavit was filed with the consent of his employers namely Messrs Skrine & Co and not under the authority nor the sanction of his erstwhile clients – the first defendant.

(3) The plaintiffs' claim for summary judgment was based on the admission letter. The court has the prerogative to determine whether or not to interpret the contents of the admission letter as an admission or otherwise.

(4) It was not open to the drafters of that admission letter to now explain the admission by clarifying "what we were trying to convey".

(5) He verily believed that the contents of the admission letter was self explanatory and Ashok's affidavit merely tried to obfuscate the clear admission of the sum of RM7,675,328.76 by the first defendant.

In regard to Daisuke Sugiura's affidavit in encl. 51, Goh Nai Boon had this to say:

(1) The contents of Daisuke Sugiura's affidavit had detracted from the issue of whether or not Messrs Skrine & Co's letter the admission letter, constituted an admission of the sum of RM7,675,328.76 and had introduced extraneous evidence to challenge the admission.

(2) He verily believed that it was open to the first defendant to state all that was stated in Daisuke Sugiura's affidavit by denying and disputing the plaintiffs' demand but the first defendant did not instruct their solicitors to do so and instead the instructions from the first defendant were: not to admit the whole sum of RM15,509,268.71 as demanded but rather to admit only part of the sum of RM7,675,328.76.

(3) He verily believed that the first defendant was estopped from disputing the admitted sum of RM7,675,328.76 by introducing their own computation as contained in exh. "DS7" of Daisuke Sugiura's affidavit in encl. 51.

(4) He verily believed that the first defendant had no defence to the plaintiffs' claim for the sum of RM7,675,328.76 and that Daisuke Sugiura's affidavit was filed merely for the purpose of delaying judgment being entered for the said sum and execution thereafter for that sum.

(5) He respectfully prayed that the plaintiffs be given leave to enter judgment for the sum of RM7,675,328.76 based on the first defendant's instructions to their own erstwhile solicitors – Messrs Skrine & Co., whose reputation

and experience in the field of litigation is well established in this country. He further deposed that the admission letter was based on clear, unequivocal language and plain simple arithmetic.

The Law On Summary Judgment

Order 14 is a summary judgment procedure and it was succinctly explained by Halsbury LC in *Jacobs v. Booth Distillery Co* [1901] 85 LT 262 HL as follows:

> There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to expense, and where it is not in aid of justice that such things should continue, Order 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights.

In *Syn Lee & Co Ltd v. Bank of China* [1961] MLJ 87, Thomson CJ explained the summary jurisdiction in these words:

> On the other hand we have to remember that the Order is there as much in the interests of the defendants as in the interests of plaintiffs. It is in the interest of plaintiffs that they should be able to get prompt judgment when there is no real defence. But on the other hand it is in the interest of defendants in such cases that plaintiffs should be able to get judgments not only expeditiously but economically.

That brilliant judge Hashim Yeop A. Sani SCJ in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 at p. 185 in clear language explained the basis of the summary jurisdiction:

> The underlying philosophy in the Order 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to judgment. Order 14 is not intended to shut out a defendant. The jurisdiction should only be exercised in very clear cases.

That same brilliant judge in *Koh Siak Poo v. Perkayuan OKS Sdn Bhd* [1989] 3 MLJ 164 explained the parameters of the appellant court's jurisdiction to interfere in O. 14 cases in these fine words (at p. 165 of the report):

> The approach to be taken by an appellate court in an Order 14 appeal has been settled. The appeal court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing. This principle was reiterated in *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* which referred to *National Company for Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 following *European Asian Bank v. Punjab and Sind Bank* [1983] 2 All ER 508 at p. 516.

Another brilliant judge in the person of Mohamed Azmi SCJ lucidly explained the law on O. 14 in *Bank Negara Malaysia v. Mohd Ismail & Ors* [1992] 1 MLJ 400 and at p. 408 of the report his Lordship employed these fine words:

> In our view, basic to the application of all those legal propositions, is the requirement under O. 14 for the court to be satisfied on affidavit evidence that the defence has not only raised an issue but also that the said issue is triable. The determination of whether an issue is or is not triable must necessarily depend on the facts or the law arising from each case as disclosed in the affidavit evidence before the court. On the treatment of conflict of evidence on affidavits, Lord Diplock speaking in the Privy Council on *Eng Mee Yong & Ors v. Letchumanan* [1979] 2 MLJ 212 (folld) had this to say at p 217:
>
> > Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.
>
> Although Lord Diplock was dealing with an application for removal of caveat in that particular case, we are of the view that the above principle of law is relevant and applicable in all cases where a judge has to decide a case or matter on affidavit evidence.
>
> Under an O. 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other in an affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially in an O. 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.
>
> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (See *Cow v. Casey* [1949] 1 All ER 197 (folld) and *European Asian Bank AG v. Punjab & Sind Bank* [1983] 2 All ER 508 (folld) at p 516.)

With these principles in mind, I will now proceed to the heart of the matter. Both parties agreed that the construction to be placed on the admission letter was entirely the domain of this court and it was that very letter that should be construed and on which the summary judgment procedure hinged on.

Paragraph 3(vi) of the admission letter as reproduced earlier reads as follows:

> It has always been within your clients' knowledge that your clients' total claim is for the sum of RM20,237,346.85 and our clients have made payments amounting to RM12,562,108.09. The outstanding balance claimed by your clients is therefore RM7,675,328.70. Your clients have inflated the current claim to RM15,509,268.71. Your client's claim is not only inconsistent but baseless.

Certain observations must be made here. Firstly, the admission letter was in response to a notice of demand under s. 218 of the Companies Act 1965. Secondly, the admission letter was not a letter written casually but it was a letter written with proper attention and thought being given to it. Thirdly, the admission letter was written on the first defendant's instructions to its firm of solicitors, namely M/s Skrine & Co. – a reputable law firm in the country.

But Ashok saw it fit to affirm an affidavit in encl. 50 in an attempt to explain away the admission in the admission letter. In my judgment, it was not for Ashok on wisdom of hindsight to explain away the admission in the admission letter. The domain to interpret and to give a plain and simple construction to the admission letter rests entirely with the court and not with Ashok. It must be borne in mind that when Ashok deposed the affidavit in encl. 50 it was with the consent solely of M/s Skrine & Co and not made on the authority nor with the consent of the first defendant. Clearly encl. 50 affirmed by Ashok must be viewed in the context of what Shankar J (as he then was) said in *Million Group Credit Sdn Bhd v. Lee Shoo Khoon & Ors* [1985] 1 CLJ 181 particularly at p. 184:

> A second point which needs to be emphasized is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence. The rules relating to conduct and etiquette in the profession quite clearly say that a solicitor should not appear as such in a matter in which he has reason to believe that he will be a witness in respect of material and disputed question of fact (see Rule 28 of the Legal Profession (Practice & Etiquette) Rules, 1978).

Then there is the case of *Seng Huat Hang Sdn Bhd v. Chee Seng & Co Sdn Bhd* [1985] 2 CLJ 97 where the court held that affidavits are personal to those who depose them and if statements made in those affidavits are incorrect, the deponents must be held liable and accountable and, if I may say, that liability would be under the Penal Code. In *Datin Melati Abdullah & Ors v. Syed*

Hassan Syed Salim [1999] 5 CLJ 582, I emphasised the need that counsel for the defendant having conduct of the case should not affirm an affidavit deposing to facts and matters not within his own knowledge. I too emphasised in that case that in matters where disputed questions of facts were involved, it would be best that the parties and not their solicitors who should affirm affidavits thereto. Incidentally, the affidavits in support of the applications in encls. 19, 22 and 14 were all affirmed by their respective solicitors and it was a bad move – procedurally these solicitors could be subjected to the usual process of cross-examinations.

Ashok in his affidavit in encl. 50 sought to explain the admission letter and in so doing he was varying the admission letter particularly as to its contents. Sections 91 to 99 of the Evidence Act 1950 deal mainly with the exclusion of oral by documentary evidence. Section 91 of the Evidence Act 1950 requires the production of the document itself for proof of its contents and in this context the admission letter had been produced and exhibited. Section 92 of the Evidence Act 1950 operates and comes into operation after the document has been produced for the purpose of excluding evidence of any oral agreement or statement to contradict, vary, add to or subtract from its terms. Both ss. 91 and 92 of the Evidence Act 1950 are categorised under the "best evidence rule" and these two sections supplement one another to a large extent and they must be read with s. 144 of the Evidence Act 1950: *Hira Devi v. Official Assignee, Bombay* AIR [1958] SC 448, 449-450. Phipson in his treatise on "*Evidence*", 9th edn at p. 602 aptly said:

> Where the transaction has been reduced into writing merely by agreement of the parties', it is observed, 'extrinsic evidence to contradict or vary the writing is excluded only in proceedings between such parties or their privies, and not in those between strangers, or a party and a stranger; since strangers cannot be precluded from proving the truth by the ignorance, carelessness, or fraud of the parties *R v. Cheadle* [1832] 3 B & Ad 833 (A); nor in proceedings between a party and a stranger, will the former be estopped, since there would be no mutuality'.

In the same vein, reference to the following cases should be of great help

(1) *Director General of Inland Revenue v. Ee Sim Sai* [1977] 2 MLJ 32; and

(2) *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 FC.

Section 92 of the Evidence Act 1950 provides that as a general rule evidence of any oral agreement is not admissible as between the parties to contradict, vary, add to or subtract from the terms of the written agreement proved under s. 91 of the Evidence Act 1950 unless the evidence sought to be introduced falls within one of the provisos of the section. Salleh Abas FJ (as he then

was) in *Tan Chong & Sons Motor Co (Sdn) Bhd v. Alan McKnight* [1983] 1 MLJ 220, 229 FC in fine language said:

> Perhaps, a short answer to the objection can be given in that prohibition against admissibility of evidence under section 92 only applies where all – as opposed to some only – of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing, oral evidence could be given to prove the terms agreed to orally. The expression 'When the terms of any such contract' at the beginning of section 92 must be read to mean 'When all the terms of any such contract': *Damu Jadhao v. Paras Nath Singh* [1965] 2 MLJ 38, 39.

There are six provisos to s. 92 of the Evidence Act 1950 and they operate as exceptions to the general rule. In *Tan Chong & Sons Motor Co (Sdn) Bhd v. Alan McKnight (supra)*, particularly at p. 229 FC, Salleh Abas FJ (as he then was) aptly and correctly stated the law in these words:

> There is this rule of evidence contained in section 92 of the Evidence Act to the effect that no oral evidence will be admissible to contradict, vary, add or subtract the terms of a written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section.

The law as enunciated in s. 92 of the Evidence Act 1950 which excludes oral evidence to contradict a written document unless it falls within one of the six provisos to the section is nothing new as it is the same as that of England. English courts too function and rely on the same provisos like ours (*United Malayan Banking Corp Bhd v. Tan Lian Keng and Ors* [1990] 1 MLJ 280 HC; *Pedac Holdings (S) Pte Ltd v. First Noodle Shop Pte Ltd* [1990] 2 MLJ 404 HC).

In the present case, Ashok by affidavit evidence was trying to adduce evidence – not oral evidence, and Ashok was authorised to depose the affidavit in encl. 50 by M/s Skrine & Co and not by the first defendant, and all these attempts were done in an attempt to come within one of the provisos of s. 92 of the Evidence Act 1950. It is now trite law that the onus is on the party who wants to adduce oral evidence to show that it comes under one of the provisos to s. 92 of the Evidence Act 1950 (*Ponniah v. Chinniah* [1961] MLJ 66 CA).

Proviso (f) to s. 92 of the Evidence Act 1950 cannot, by any stretch of the imagination, be strictly construed as an exception to s. 92 of the same Act. It torches on and deals with the admissibility of extrinsic evidence as an aid to the construction of documents in order to show in what manner the language of the document is related to the existing facts. Proviso (f) must be read with ss. 93 to 98 of the Evidence Act 1950. In *Wickman Tools v. Schuler AG* [1974] AC 235, at p. 261, the court there succinctly said:

> The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used.

and likewise here, this court needs only to look within the four corners of the admission letter to ascertain the intentions of not only the first defendant but also the plaintiffs and having done that – with particular reference to para. 3(vi) of the admission letter, the irresistible conclusion on a plain and literal construction thereof would be that the first defendant owed the plaintiffs a sum of RM7,675,328.70 and this was the quantum that was still outstanding and due to the plaintiffs from the first defendant. My attention was drawn to the case of *Poh Sin Mining Co. v. Welfare Insurance Co Ltd* [1971] 1 MLJ 65 to show the admissibility of extrinsic evidence. In that case the defendants disclaimed liability on a workmen's insurance policy as they said it was issued not to the plaintiff's company but to Lau Sook Khim and Hah Ah Sin. The proposal was signed by one Liau Kiam Leong and over his name was impressed the rubber stamp of the plaintiff's company but the cover note was in the name of Lau Sook Khim and Hah Ah Sin of Poh Sin Mining Company. The court held that there could be no doubt as to the identity of the actual employers covered by the policy. The court too held that if there was a latent ambiguity in the policy extrinsic evidence was admissible to identify the persons and things referred to in the policy and in the light of the evidence and the surrounding circumstances, the insured was identified to be the plaintiff's company. Factually, the case of *Poh Sin Mining Co v. Welfare Insurance Co Ltd (supra)* can be readily distinguished. That was an insurance case whereas here was a building contract case for the KLIA project. Here, the court was concerned with interpreting the admission letter that was drafted by the first defendant's solicitors. The then Federal Court in *Lee Wah Bank Ltd v. Ng Kim Lek & Ors* [1979] 1 MLJ 21 through Chang Min Tat FJ observed at p. 22 of the report:

> Section 92, of course, applies where upon the face of it, the written instrument appears to contain the whole of the terms of the contract. But where it appears that it does not contain the whole agreement between the parties and that there are certain other oral conditions which are not inconsistent with the written instrument and which would make up the whole contract, oral evidence is admissible to prove those other conditions.

> The question in this case is whether the evidence of the application of the respondents for an overdraft limit of $80,000 and a further facility of $20,000 for Letters of Credit on 60 days' sight and of the correspondence and the oral testimony is admissible to show that the limit of $100,000 in the Bill of Sale and the Charges is in fact and in law made up of those two amounts. In our view and with respect, the evidence is admissible. It is not inconsistent with the written instruments. It serves to explain that the sum of $100,000 secured in those instruments was to be made up of two sums $80,000 on the overdraft

> and $20,000 on Letters of Credit. It is evidence admissible under proviso (f) to s. 92 Evidence Act, to show in what manner the language of a document is related to existing facts. It is admissible evidence, being confined strictly to surrounding facts so intimately connected with the instruments that they afford reliable material for ascertaining the nature and extent of the subject-matter referred to: see, also, *Oriental Bank of Malaya Ltd v. N Subramaniam* [1958] MLJ 35. The sum of $100,000 is, in our view, a latent ambiguity in the circumstances which requires extrinsic evidence to identify its exact application. The admissible evidence must necessarily establish that the limit of the overdraft was $80,000.

and it was said in the context of an oral testimony. Advocates & Solicitors are trained in the law and they are presumed to be able to write as well as they could talk. The admission letter was prepared by a well known firm of solicitors – M/s Skrine & Co, and not by a struggling law firm. The services rendered by M/s Skrine & Co should be at par with other renowned law firms in this part of the world. Thus, when seen in this context the admission letter must have been written with deliberation and professionalism and there was thus no need to explain what was written therein. But Ashok saw it fit to venture to explain the meaning behind para. 3 (vi) of the admission letter.

Now, going into the heart of the matter the language employed in the admission letter can be said to be plain and simple. The word "outstanding" according to "*The Concise Oxford Dictionary of Current English*" by HW Fowler and FG Fowler, ninth edition means:

> conspicuous, eminent, especially because of excellence, remarkable in a specified field.

and the word "balance" in the same dictionary means:

> the difference between an amount due and an amount paid, an amount left over

The phrase "outstanding balance" must surely mean the balance that was not paid and the amount would be RM7,675,328.76. Paragraph 3(vi) of the admission letter is a classic example of the language that was employed was so plain that it admits of one meaning and so the task of interpretation can hardly be said to arise. It is the duty of this court to expound the law and in the context of para. 3(vi) of the admission letter, to interpret it as it stands, and to "leave the remedy (if one be resolved upon) to others" (*Sutters v. Briggs* [1922] 1 AC 1, per Lord Birkenhead LC at p. 8). I have adopted the approach set out at p. 28 of *Maxwell on Interpretation of Statutes* (12th edn) and adopted by Gill CJ (Malaya) (as he then was) in *H Rubber Estates Bhd v. Director-General of Inland Revenue* [1979] 1 MLJ 115, in interpreting the phrase "outstanding balance" appearing in para. 3(vi) of the admission letter. That approach was this:

> The safer and more correct course of dealing with the question of construction is to take the words themselves and arrive if possible at their meaning without in the first instant reference to cases.

Messrs Skrine & Co acted for the first defendant. A solicitor on record is said to be authorised to act as the client's authorised agent in all matters which may reasonably be expected to arise for decision in the proceedings. In 1865 in the case of *Prestwick v. Poley* 18 CBNS 806 at 816, Sir Montague Smith said:

> The attorney is the general agent of the client in all matters which may reasonably be expected to arise for decision in the cause.

Thus, when M/s Skrine & Co sent that admission letter the first defendant must be bound by its contents and cannot resile from it. This was my judgment and I so hold accordingly. In was also my judgment that the SAR was justified in his conclusion that the first defendant had indeed admitted owing the plaintiffs the sum of RM7,675,328.76. The case of *Malacca Precast Concrete Works v. William Jacks & Co (M) Sdn Bhd* [1970] 2 MLJ 111 FC was a case in regard to a judgment on admission. Ali FJ speaking for the then Federal Court was of the view that the letter from the solicitors amounted to an admission of liability and his Lordship held that the trial judge was right in giving judgment on such admission. Likewise here the admission letter tied the neck of the first defendant to the noose, so to speak, for there was a clear admission by the first defendant of the debt amounting to RM7,675,328.76 that was due to the plaintiffs.

For the reasons adumbrated above, I have no hesitation in dismissing encl. 69 with costs.

Enclosure 108

Basically this was an application by the first defendant for a stay of execution of the order of the SAR who gave summary judgment in favour of the plaintiffs for the sum of RM7,675,328.76 against the first defendant together with interest at 8% per annum from the date of the summons in chambers in encl. 31 until realisation and costs. Enclosure 108 also encompasses an application by the first defendant for a stay of execution of my decision in affirming the decision of the SAR in regard to encl. 31. Enclosure 108 was supported by an affidavit that was deposed by Daisuke Sugiura on 20 August 1999 and filed on the next day as seen in encl. 107. The reply came from Goh Nai Boon who affirmed an affidavit on 3 September 1999, which affidavit was filed on 6 September 1999 as seen in encl. 134. After hearing submissions from Mr. Rajesh Jethi for the first defendant and Mr Pathmanathan for the plaintiffs, I forthwith dismissed encl. 108 with costs. The reasons for that dismissal now follow.

Let me recapitulate. The first defendant had appealed against the order of the SAR and the appeal was heard by me on the basis of a full hearing. I heard the appeal on its merits and at the end of the day dismissed it with costs. Thus, it would be unethical for the first defendant to submit through its counsel and say that they have merits in their appeal or that my decision that was handed down in dismissing encl. 69 with costs were flawed or incorrect. The right forum to advance the merits of the first defendant's appeal would be before the Court of Appeal – otherwise I would be invited to review and fault my own decision. That just won't do.

I gave my construction to the contents of the admission letter particularly para. 3 (vi) thereof. Both counsel for the first defendant and the plaintiffs had agreed and submitted that it was my domain to interpret and construe the admission letter accordingly. I did just that and in my view it was too late in the day for the first defendant to resile and go behind the plain print of the admission letter. In my judgment, the contents of the admission letter gave rise only to one conclusion: that the first defendant admitted the plaintiff's claim amounting to RM7,675,328.76. On a plain and simple reading that would be the correct construction of the admission letter. In my judgment, having perused through the admission letter with a toothcomb there were no merits at all to the first defendant's appeal. It must be recalled that the admission letter was prepared by a renowned law firm in the country and the first defendant must be estopped from denying its contents.

Absence Of Special Circumstances And The Appeal Will Not Be Rendered Nugatory

The plaintiffs must be considered as judgment creditors. It is a fundamental principle of law that the court will not decree in favour of a litigant and at the same time deprive the litigant of the fruits of his litigation. The courts have, in the past and will continue to do so in the future, assist successful litigants to achieve and taste the fruits of their litigation. This court too will adopt the same stand. To do otherwise would spell trouble. To prevent any unsuccessful litigant from disregarding a judgment of this court with impunity, this court must act swiftly and bring to bear and put effect to its judgment.

The judgment obtained by the plaintiffs was in the nature of a money judgment and the question of destruction of the subject matter or the disappearance of the substratum of the appeal did not arise at all.

Through Goh Nai Boon a crucial point was made as to the solvency of the plaintiffs. It was deposed that the plaintiffs were solvent and have the means and the resources to refund to the first defendant the judgment sum in the unlikely event of them not succeeding in the Court of Appeal. Goh Nai Boon

reiterated at great length that the plaintiffs' equipment and machinery located at the plaintiffs' factory at Kluang was far in excess of RM12 million.

It was deposed that by reason of the most serious recession in Malaysia for the last 2 1/2 years, the plaintiffs were not spared the ordeal. The building and the construction sectors were sluggish, the debts due to the plaintiffs were difficult to collect. Even the debt of the first defendant was equally difficult to collect. Taking stock of the economic situation, the plaintiffs decided not to undertake new projects which involved substantial sums until the economic situation bounced back to its original form and the construction sectors have completely recovered. All the same, the plaintiffs remained active in its business ventures and undertook contracts on a smaller scale where payments would be prompt, immediate and assured.

The first defendant made a sinister suggestion that something was amiss with the plaintiffs since no records were filed with the registrar of companies since 1995. This was totally untrue. The plaintiffs have changed their auditors and accountants and were in the process of filing updated accounts. In law there was no necessity and not a requirement on the part of the judgment creditor to prove its solvency to his judgment debtor: *Tac Construction & Trading v. Bennes Engineering Berhad (No 2)* [1999] 2 CLJ 518. It was rightly deposed that the plaintiffs have been deprived of their just claim for years and have had to seek legal redress at substantial expense and inconvenience. It was ironic that the first defendant as the judgment debtor and who were responsible for the plaintiffs' hardship could point to the fact that they were financially flushed as a ground to avoid payment. In my judgment, neither the solvency of the plaintiffs as the judgment creditors nor the difficulty of recovering the monies constitute special circumstances in law to justify the grant of a stay of execution. The fears of the first defendant as expressed in the affidavit of Daisuke Sugiura in encl. 107 at para. 7(c) to the real possibility that the plaintiffs will not be in the position to reimburse the judgment sum with interest to the first defendant should the first defendant's appeal be successful must be dismissed as unjustified and unfounded.

The law journals are replete with authorities in regard to a stay. For this exercise, I shall refer to some of them.

In *Griffiths v. Benn* 27 TLR 350, the Master of the Rolls observed:

> ... where, after a full hearing, a definite conclusion was arrived at by the Court of Appeal, it was not fair on a successful litigant to hamper him with any such undertaking and it would need most exceptional circumstances to induce this court to accede to such an application.

In *Atkins v. The Great Western Railway Company* 11 TLR 400, it was alleged in support of an application for stay of execution pending appeal that a great deal of prejudice had been imported into the case at the trial and that there were strong grounds for the appeal. The court was very firm and held that the grounds were not sufficient to grant the application.

In *Smith, Hogg & Co Ltd v. The Black Sea & Baltic General Insurance Co. Ltd* 162 LT 11, Scott LJ remarked:

> The Court of Appeal has had to consider this question some time ago and decided that the practice on appeals to the House of Lords was that stay of execution, pending such an appeal, would not be granted save under very exceptional circumstances, such as for instance, where execution would destroy the subject matter of the action or deprive the appellant of the means of prosecuting the appeal. In our view the appellant's motion is not consistent with the practice on which this court, after consideration, has determined.

Halsbury's Laws of England, 3rd edn, vol. 16 at p. 35 states as follows:

> The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

The case of *Monk v. Bartram* [1891] 1 QB 346 laid down these principles of law: allegations that there has been misdirections, that the verdict or judgment was against the weight of the evidence or that there was no evidence to support the verdict or judgment cannot be said to be special circumstances which would entitle the court to grant the application for a stay.

In *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406, Hashim Yeop A. Sani J (as he then was) at p. 407 said:

> From the affidavit of the applicant here it seems clear that the sole ground relied on as special circumstances is to be found in paragraph 5 of the affidavit which reads as follows:
>
> > I believe, it is imperative that a stay be granted as otherwise it will cause a permanent deprivation of money if the plaintiff firm succeeds in the Appeal as there are merits in the Appeal in that there are points of law and facts for argument.
>
> Based on past precedents and authorities this ground cannot be regarded as special circumstances to justify an order for stay. In my opinion the application here was misconceived and I accordingly dismissed the motion with costs.

In *Tac Construction & Trading v. Bennes Engineering Berhad (No 2) supra*, the following principles were established:

(1) an appeal does not operate automatically as a stay of execution;

(2) the validity or correctness of a judgment cannot be considered as special circumstances; and

(3) permanent deprivation of monies paid or the defendant would not be restored to its original position or difficulty of recovering monies from the plaintiff or the plaintiff would not be in a position to reimburse the defendant are not special circumstances even if the defendant succeeds on appeal.

Applying these cogent principles of law to the present case would be of benefit to the plaintiffs and not to the first defendant. This was my judgment and I so hold accordingly.

The nugatory approach as exemplified in *Tac Construction & Trading v. Bennes Engineering Berhad (No 2) (supra)* simply means this: it is to prevent an appeal, if successful, nugatory. In the event the first defendant succeeds in their appeal, the plaintiffs being solvent could well afford to reimburse RM7,675,328.76 bearing in mind the stock in trade of the plaintiffs amounted to RM12 million. This was a money judgment which could easily be reimbursed by the plaintiffs and so the nugatory approach when applied would not aid the first defendant at all. No stay of execution would be granted to the first defendant as the plaintiffs must be entitled enjoy the fruits of their litigation.

I will now proceed to an interesting topic and that would be this: the first defendant's application for an injunction in the Shah Alam High Court filed by Messrs Shook Lin & Bok of Kuala Lumpur.

For reasons best known to the first defendant, they have on the sly moved the High Court at Shah Alam to, *inter alia*, injunct the plaintiffs from presenting a winding up petition and in so doing the first defendant had gone beyond the bounds of propriety. That application in the High Court at Shah Alam called into question, *inter alia*, the correctness, the validity, the wisdom of the decision of this High Court. That would surely be hitting below the belt. A despicable act that cannot be condoned by this court. A despicable act by a desperado.

The plaintiffs, to play safe, have since applied to the High Court at Shah Alam to transfer the Shah Alam case to this High Court at Johor Bahru.

In filing an application for an injunction in the Shah Alam High Court, the first defendant had clearly abused the process of the court (*Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin bin Ungku Mohamed* [1998] 2 MLJ 425) and this court cannot tolerate the conduct of the first defendant at all.

Enclosure 108 should be dismissed with costs.